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U.S. Citizenship
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: OCT 16 2006

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

 Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides software consulting services. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a U.S. baccalaureate or foreign equivalent degree.

On appeal, the petitioner submits education evaluations and materials upon which the evaluations rely. The new materials do not overcome the director's ultimate basis of denial. Moreover, the beneficiary does not have the degree in the field specified on the labor certification.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign three-year bachelor's degree. The issue is whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree as claimed. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

- (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
- (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for

the purpose of “matching” them with those of corresponding United States workers so that it will then be “in a position to meet the requirement of the law,” namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the Circuit Court of Appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”)

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). The Joint Explanatory Statement of the Committee of Conference provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990). At the time of enactment in 1990, it had been almost thirteen years since *Matter of Shah*. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. *Lujan-Armendariz v. INS*, 222 F.3d 728, 748 (9th Cir. 2000) *citing Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees

must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 244. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Thus, in order to have the experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. As noted in the federal register, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience.

The petitioner does not attempt to distinguish *Matter of Shah*, 17 I&N Dec. at 244. Rather, the petitioner advocates for a contrary finding in this matter, without acknowledging the existence of this precedent decision. Specifically, the petitioner asserts that based on UNESCO resolutions and the credits typically required for Indian three-year degrees, such degrees should be considered foreign equivalent degrees.

Initially, the petitioner submitted two evaluations, one from [REDACTED] at Career Consulting International (CCI) and one from [REDACTED] at Marquess Educational Consultants (MEC). Both evaluations conclude that the beneficiary's three-year degree from the University of Mysore is equivalent to a U.S. Bachelor of Science Degree. The evaluation from CCI lists 120 credits, although the evaluation does not explain how it determined the number of credits for each course other than equating one "contact" hour to 15 classroom hours (50 minutes). The beneficiary's transcript does not contain either credit hour or classroom hour information.

[REDACTED] further asserts: "UNESCO clearly recommends that the 3 and 4 year Indian degree should be treated as equivalent to a bachelor's degree by all UNESCO members." She provides three website addresses in support of this assertion and subsequently quotes the following UNESCO recommendation:

Member States should take all feasible steps within the framework of their national systems and in conformity with their constitutional, legal and regulatory provisions to encourage the competent authorities concerned to give recognition, as defined in paragraph 1(e), to qualifications in higher education that are awarded in the other Member States.

As noted by the director, the petitioner did not submit the actual UNESCO recommendation initially but does so on appeal. The above quote omits the second half of the sentence, which states: “with a view to enabling their holders to pursue further studies, training or training for research in their institutions of higher education, subject to all academic admission requirements obtaining for nationals of that State.”

[REDACTED] then lists British and U.S. universities that admit into graduate programs those with three-year Indian degrees. She notes that in the United States, some colleges issue baccalaureate degrees in less than four years where “the assessment of prior learning is taken into account.”

The evaluation from MEC also cites “accelerated programs at the bachelor’s level now offered by accredited schools in the United States” and the UNESCO recommendation. The evaluation concludes that if a three-year baccalaureate is recognized as an appropriate admission to graduate school in India, it should be similarly recognized in the United States.

The petitioner also submitted the article “Does the Value of Degree Depend on the Color of Your Skin?” coauthored by [REDACTED] and [REDACTED]. The record contains no evidence that this article has actually been published in addition to being posted on a website. The article indicates that an Indian three-year degree “often” involves more than 1800 credit hours and that the Indian system “presupposes that general education (pre-major studies) occur at the Intermediate level.” The article includes British colleges that accept three-year degrees for admission to graduate school but concedes that “a number of other universities” would not accept three-year degrees for admission to graduate school. Similarly, the article lists some U.S. universities that accept three-year degrees for admission to graduate school but acknowledges that others do not. In fact, the article concedes:

None of the members of N.A.C.E.S. who were approached were willing to grant equivalency to a bachelor’s degree from a regionally accredited institution in the United States, although we heard anecdotally that one, W.E.S. had been interested in doing so.

In this process, we encountered a number of the objections to equivalency that have already been discussed.

[REDACTED], President of Educational Credential Evaluators, Inc., commented thus,

“Contrary to your statement, a degree from a three-year “Bologna Process” bachelor’s degree program in Europe will NOT be accepted as a degree by the majority of

universities in the Untied States. Similarly, the majority do not accept a bachelor's degree from a three-year program in India or any other country except England. England is a unique situation because of the specialized nature of Form VI."

* * *

International Education Consultants of Delaware, Inc., raise similar objections to those raised by ECE.,

"The Indian educational system, along with that of Canada and some other countries, generally adopted the UK-pattern 3-year degree. But the UK retained the important preliminary A level examinations. These examinations are used for advanced standing credit in the UK; we follow their lead, and use those examinations to constitute the an [sic] additional year of undergraduate study. The combination of these two entities is equivalent to a 4-year US Bachelor's degree.

The Indian educational system dropped that advanced standing year. You enter a 3-year Indian degree program directly form Year 12 of your education. In the US, there are no degree programs entered from a stage lower than Year 12, and there are no 3-year degree programs. Without the additional advanced standing year, there's no equivalency.

The director concluded that the materials provided were "from a position of advocacy" and noted that such evaluations are advisory only. The director asserted that the results of an Internet search on April 12, 2006 revealed that several U.S. universities do not accept three-year baccalaureate degrees for admission to graduate school. As noted above, the director also concluded that the petitioner had not provided the UNESCO recommendations quoted.

On appeal, the petitioner submits new evaluations from CCI and MEC and 138 pages of UNESCO materials, only two of which are relevant. The recommendation provided relates to "recognition" of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

"Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State an deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for a class of individuals defined

by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define “comparable qualification.” At the heart of this matter is whether the beneficiary’s degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

The evaluation from CCI submitted on appeal is slightly different from the initial evaluation. Specifically, [REDACTED] provides a different breakdown of courses and credits and concludes:

Although programs, degree requirements and specializations differ in various respects, it is the judgment of Career Consulting International that [the beneficiary’s] international course work is *comparable* to a Bachelor of Science in Computer Science from a Regionally Accredited Institution of Higher Education in the United States of America. Thus, for professional employment and for immigration purposes – *per 8 C.F.R. section 214.2(h)(4)(iii)(D)* – [the beneficiary] may be considered to have completed studies, which are comparable to a Bachelor of Science in Computer Science from a Regionally Accredited Institution of Higher Education in the United States of America.

(Emphasis added.) At issue is not whether the coursework may, in some respects, be “comparable.” The issue is whether the beneficiary has a degree that is a foreign equivalent degree. Significantly, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D), relating to nonimmigrants, allows for evidence of “[e]quivalence to completion of a college degree.” Subparagraph (5) of this provision allows for the combination of education and experience. The general language cited by Dr. Danzig does not appear in the regulation relevant to the immigrant classification sought, 8 C.F.R. § 204.5(k), which requires a foreign equivalent degree to a U.S. baccalaureate.

The petitioner also submits a letter from the Principal of B.E.S. Sant Gadge Maharaj College asserting that the University of Mumbai requires more than 1800 contact hours, “on par” with those required at U.S. universities. The beneficiary did not attend the University of Mumbai.

Finally, the petitioner submitted a 1997 report on Indian education by [REDACTED] Director of Admissions and Registrar at the University of Missouri, Kansas City. The report does not suggest that every Indian three-year degree, standing on its own, is a foreign equivalent degree to a U.S. baccalaureate. Rather, the report suggests that a three-year degree with “at least a first class honours” after graduation from a CBSE or CISCE Grade XII secondary school should be considered “comparable” to a U.S. baccalaureate. The record contains no evidence that this report from 1997 has been adopted. The record contains insufficient explanation of the CBSE or CISCE Grade XII program to accept this standard. Regardless, even if we were to accept this proposed standard, the record lacks evidence that the beneficiary graduated from a CBSE or CISCE Grade XII secondary school and his transcript reveals that he only graduated from Mysore University with *second* class honours.

Significantly, while the report asserts that Indian three-year degree students attend courses Monday through Saturday year round, it still concludes in Section II that a three-year degree should be

considered for admission to U.S. graduate programs only in combination *with a postgraduate diploma*. While such a combination may be sufficient for entry into a graduate program, the regulation at 8 C.F.R. § 204.5(k) does not permit the combination of degrees towards a baccalaureate in the definition of advanced degree professional. As quoted above, “both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*” 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The evaluations from [REDACTED] and [REDACTED] are not persuasive. They concede that while the Indian system is based on the British system, the British system requires 13 years of pre-undergraduate education while the Indian system, like the U.S. system, requires only 12. That some British and U.S. universities accept the Indian three-year degree for admission to graduate programs is not decisive. It can be expected that, if the three-year degree were truly equivalent to the U.S. four-year degree, all British and U.S. universities would accept such degrees for admission to graduate programs without additional coursework requirements. The article by [REDACTED] and [REDACTED] quotes at least one expert asserting that the three-year Bologna degree is *not* accepted for entry into graduate schools. Regarding the potential for earning a U.S. baccalaureate in three years, we concur that the degree itself, and not the actual number of years, is the relevant factor. A degree from a U.S. four-year degree issuing institution that is actually earned in three years by giving credit for summer work, junior college courses or college level work in high school (such as AP courses) is obviously, still a four-year degree.

The record contains no evidence that Mysore University issues four-year degrees that can be earned in three years through some type of accelerated program. As stated above, the beneficiary’s transcript does not provide any credits hours for the courses taken. [REDACTED] provides two different lists of courses and credits with no explanation for the discrepancy or how she determined the number of course hours used to calculate “contact” hours. For example, on appeal, [REDACTED] asserts that every course is worth 6.31 credits while her earlier evaluation awarded six credits for most courses with some courses worth eight credits.

Moreover, the petitioner filed a previous petition in behalf of the beneficiary, LIN-04-074-50664, which was accompanied by an evaluation of the beneficiary’s credentials by [REDACTED] who stated:

Calculations based on course duration and composition in the Bachelor of Science program, indicate that [the beneficiary] satisfied similar requirements to *the completion of three years of academic study toward a Bachelor of Science Degree* from an accredited institution of tertiary education in the United States.

(Emphasis added.) After considering the beneficiary's university studies, the evaluator evaluated the beneficiary's work experience subsequent to his bachelor's degree. The evaluator concluded:

The demonstration of Eighteen Years, Eleven Months of specialized work experience in Computer Science, *considered together with* his prior studies at The University of Mysore, indicate that [the beneficiary] satisfied similar requirements to the completion of a Bachelor of Science Degree in Computer Science from an accredited institution of tertiary education in the United States.

Thus, the evaluations from [REDACTED] and [REDACTED] are inconsistent with the evaluation of the same degree by [REDACTED]. Where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. at 795; *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Moreover, It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not resolve the inconsistency between the evaluation b [REDACTED] and the evaluations by [REDACTED] and [REDACTED]

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: College: “yes.”
Degree Required: “Bachelor of Science or Equivalent”

Major Field of Study: "Computer Science or Computer related field."

Experience: 5 years in the job offered or a related occupation.

Block 15: "*Master's in Computer Science or Equivalent with more than 3 years experience is acceptable."

CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K. Irvine*, 699 F.2d at 1009 FN5 (*citing Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work

experience and formal education. The Certifying Officer concluded that “a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers.” BALCA concluded:

We have held in *Francis Kellogg, et al.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer’s stated minimum requirement was a “B.S. or equivalent” degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

Significantly, when DOL raises the issue of the alien’s qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL’s certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court. If we were to accept the employer’s definition of “or equivalent,” instead of the definition DOL uses, we would allow the employer to “unlawfully” tailor the job requirements to the alien’s credentials after DOL has already made a determination on this issue based on its own definitions. We would also undermine the labor certification process. Specifically, the employer could have lawfully excluded a U.S. applicant that possesses experience and education “equivalent” to a degree at the recruitment stage as represented to DOL.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine “the language of the labor certification job requirements” in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

For the reasons discussed above, the beneficiary does not have a bachelor of science or equivalent as required in Box 14. Moreover, the beneficiary's transcript lists not a single computer science course. Rather, the beneficiary took courses in physics, chemistry, mathematics, English and "Konnada." As stated above, the original evaluation by [REDACTED] concludes that the beneficiary's degree, *in combination with subsequent work experience in computer science*, is equivalent to a degree in computer science. In her initial evaluation, [REDACTED] concludes that the beneficiary's three-year degree, on its own, is equivalent to a U.S. bachelor of science in computer science. She provides no explanation for her conclusion as to the major field of study. [REDACTED] asserts that the beneficiary obtained his degree in 1982, when "education in computer science was in its infancy." [REDACTED] continues that early computer science professionals had degrees in theoretical physics and mathematics, subjects that are key elements in computer science. Thus, [REDACTED] concludes that this information demonstrates the "functional equivalency" of the beneficiary's degree to a bachelor of science in computer science.

Assuming that degrees in computer science were not widely available in 1982, and the petitioner submitted no corroboration of that claim, that fact would not convert a different degree earned in 1982 into a computer science or computer science related degree. The labor certification is very specific that a degree in computer science or a computer science related field is required. The petitioner did not indicate that a degree in physics, chemistry or math plus experience in the computer science field would be sufficient in the alternative. Thus, available U.S. workers with a bachelor of science in those fields could have been rejected. While we recognize the relevance of physics and math to computer science, the beneficiary's transcript lists the course titles as various levels of physics and math, with no additional description of the course titles. Thus, we cannot determine their relevance to computer science. Finally, the fact that an undergraduate degree in mathematics is sufficient for entry into a graduate computer science program does not render the undergraduate degree a degree in computer science or a computer science related field. It is frequently possible to obtain undergraduate and graduate degrees in completely different subject areas.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.